

changing approaches to demand side management and energy efficiency (“DSM/EE”) in South Carolina. Specifically, these Programs, which were proposed by the Companies as part of the April 23, 2021, applications, would provide residential customer-generators who apply to install rooftop solar and receive service under Rate RE within the Solar Choice Metering Program on or after January 1, 2022, with a one-time Rooftop Incentive Payment of \$0.36/Watt-DC. The Programs also allow residential customer-generators to assign their Rooftop Incentive Payment to solar leasing companies or entities providing solar installation. Thus, the Programs propose to pay each participating residential customer-generator up to \$7,200, based on a 20 kW rooftop solar installation.

Residential customer-generators who apply to install solar on or after January 1, 2022, also will participate in Duke Energy’s recently established Solar Choice Metering tariffs. *See* Docket Nos. 2020-264-E and 2020-265-E. In addition, participating customer-generators would be required to enroll in Duke Energy’s Power Manager Load Control Service Rider, also known as Bring Your Own Thermostat (“BYOT”) Program, which provides for winter-focused demand response.

Importantly, Duke Energy requests the Commission approve the Programs as DSM/EE programs pursuant to S.C. Code Ann. § 58-37-20. Such programs, if approved, must “allow energy suppliers and distributors to recover costs and obtain a reasonable rate of return on their investment.” *Id.* The Commission also would be required “to establish rates and charges that ensure that the net income of an electrical ... utility ... after implementation of specific cost-effective energy conservation measures is at least as high as the net income would have been if the energy conservation measures had not been implemented.” *Id.* Accordingly, if the Commission approves the Programs, Duke Energy not only will recover its expenses related to the Programs,

but also will recover net lost revenues (“NLR”) and earn an associated Portfolio Performance Incentive (“PPI”) of 10.6% on these Programs. As a result, Duke Energy projects that, in the first five (5) years of the Programs, the Companies will recover from its customers approximately \$7.5 million dollars (\$7,500,000) in total additional revenue, with the Companies earning increasing amounts of revenue each year thereafter.¹ This would be in addition to the approximately \$55 million dollars (\$55,000,000) that DEC and DEP already are recovering or are seeking to recover for their current DSM/EE programs.

Because the Companies are seeking to recover their program expenses, NLR, and associated PPI on these Programs as a DSM/EE program, the Commission is not bound by statute or regulation to approve or reject the proposed Program within a specific time. In fact, Duke Energy’s application sought approval of the Programs without the need for a hearing asserting that, “consistent with S.C. Code Ann. § 58-27-870(F), the proposed Program and associated tariff do not require a determination of the entire rate structure and overall rate of return.” Moreover, the Company requested that the Commission appoint a Hearing Officer and hold a scheduling conference if it deemed a hearing necessary. Application at p. 1. For these reasons, ORS anticipated that the Commission would seek comments from interested parties on the Proceedings and initially undertook its review and analysis of the proposal to facilitate comment development.

On July 27, 2021, however, the Commission Clerk’s Office notified the parties that the Commission would hold hearings on these matters (ORS agrees with the Commission’s decision to hold hearings) and established the following schedules in these dockets:

¹ DEC Response to ORS AIR 1 at 1-22.

	<u>DEC</u>	<u>DEP</u>
Companies' Direct	September 7, 2021	September 9, 2021
ORS/Intervenors' Direct	September 21, 2021	September 23, 2021
Companies' Rebuttal	September 28, 2021	September 30, 2021
ORS/Intervenors' Surrebuttal	October 5, 2021	October 7, 2021
Hearing	October 26, 2021	October 28, 2021

On August 13, 2021, Duke Energy filed the motion that is the subject of this Response. Therein, Duke Energy proposed the following modified and consolidated schedule:

	<u>DEC/DEP</u>
Companies' Direct	August 20, 2021
ORS/Intervenors' Direct	September 10, 2021
Companies' Rebuttal	October 1, 2021
ORS/Intervenors' Surrebuttal	October 11, 2021 (upon motion and showing that surrebuttal is warranted)
Hearing	October 26, 2021

ARGUMENT

Modifying the procedural schedules as proposed by the Companies has significant implications. First, Duke Energy's proposal seeks to substantially reduce the amount of time ORS has to review Duke Energy's request and prepare direct testimony for filing in this proceeding. Notwithstanding the apparent difficulties of limiting ORS's review of Programs which will increase costs borne by the Companies' customers, these Programs also do not have a corollary in another state, meaning ORS cannot look to compare and contrast counterparts from other states to assess the proposed Programs and develop its position. In addition, the Programs are premised upon customer-generators being enrolled in Duke Energy's Solar Choice Metering tariff programs after January 1, 2022; however, the tariffs only became effective June 1, 2021 of this year. Therefore, there is little historical data upon which ORS can rely to analyze the anticipated effect

and benefits of the proposed Programs. Moreover, the Programs contain incentives for residential customer-generators that will be paid by non-participating customers and integrate statutory provisions from Act No. 62 (S.C. Code Ann. § 58-27-845) as well as S.C. Code Ann. § 58-37-20, each of which require careful examination. Given these issues and the significant scope of the proposed Programs and the potential impacts to customers, it is important that ORS be afforded adequate time to prepare its direct testimony regarding the Companies' proposals.

Duke Energy also would have the Commission limit ORS's opportunity to present surrebuttal in this matter, thereby stifling robust discussion about the Programs' merits and decreasing the transparency of these proceedings. However, such a modification, if granted, would only serve to restrict ORS's ability to fully address any new matters or facts Duke Energy may present in its rebuttal testimony and require ORS to seek leave to present surrebuttal on issues it has a right to raise. Furthermore, reasons, Duke Energy's request would make these proceedings less efficient, more complicated, prolonged, and ultimately more expensive for the Companies' customers.

For these and the other reasons stated below, ORS respectfully requests that the Commission deny Duke Energy's motion to modify the procedural schedules as proposed.² In the alternative, ORS respectfully requests that the Commission adopt an alternative proposed schedule, which is more fully discussed in Section III below.

I. The proposed schedule for pre-filed testimony is unreasonable.

If Duke Energy's Motion is granted, ORS would be required to file its direct testimony only four (4) weeks after the Companies submitted their Motion to the Commission and almost two (2) weeks earlier than the time the Commission previously recognized as appropriate when it

² As stated previously, ORS consents to the consolidation of Docket Nos. 2021-143-E and 2021-144-E.

issued the initial schedules in these matters. ORS submits that the Duke Energy proposed schedule is unreasonable and would only serve to minimize the time in which ORS, as the agency statutorily charged with representing the public interest including the concerns of the using and consuming public, would have to analyze and prepare recommendations on the Programs.

As an initial matter, Duke Energy has not made a showing that good cause exists to modify the schedule as proposed. Duke Energy bases its request on an assertion that it only will have one (1) week to review and evaluate the other parties' testimonies, prepare, and propound discovery, and draft and file rebuttal testimony. It is important to note, however, that Duke Energy has not availed itself of the opportunity to propound any discovery as of the date of filing this Response,³ even though the Companies could have sought the production of underlying information and data that will form the basis of the positions ORS and the other parties of records will advance in this matter.⁴ Cf. Docket No. 2005-83-A, Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Pet. for Recons. of Order No. 2021-57, dated Feb. 11, 2021 ("Duke Pet. For Recons.") at p.7 (stating that, instead of reducing the amount of time between the surrebuttal testimony deadline and the hearing to allow intervenors additional time to file direct testimony, "intervenors should simply propound timely discovery to the Companies, in accordance with the Commission's rules"). The fact that the Company failed to advance discovery should not prescribe Commission action to advance the schedule.

³ Duke Energy's proposed schedule would have ORS file its direct testimony on September 10, 2021, and the Companies file their rebuttal testimony 21 days later on October 1, 2021. Although Duke states that under the current schedule, it would be unable to engage in discovery regarding ORS's direct testimony due to the Commission's 20-day discovery period, Duke Energy's proposed schedule would require the Companies to receive and review ORS's testimony on September 10, issue discovery requests that same day so that it could receive responses on September 30, and then incorporate and address those issues before filing rebuttal testimony the next day on October 1. Such a compressed timeline would appear to provide Duke Energy with little to no advantage in developing its rebuttal testimony while concurrently increasing the administrative burdens on ORS to a significant and unreasonable degree.

⁴ ORS already offered to provide the Companies with supporting workpapers to ORS testimony concurrent with the filing of its testimony.

By comparison, in fulfilling its statutory obligations as set forth in S.C. Code Ann. § 58-4-10(B), ORS propounded discovery since the initial filing.⁵ While Duke Energy asserts that DEP and DEC have been answering discovery “for some time,” engaging in such discovery is both necessary and imperative because the scope, novelty, and potential effects of these unprecedented and recently developed Programs warrants substantial inquiry by ORS. Notwithstanding the fact that Duke Energy responded to these initial discovery requests, the data received thus far and upon which ORS can ascertain the impact of the Programs is limited because the proposed Programs are based upon Duke Energy’s Solar Choice Metering tariffs, which Interim Rider became effective on June 1, 2021, following the Commission’s May 30, 2021, ruling in Docket Nos. 2020-264-E and 2020-265-E. The Permanent Solar Choice Metering Tariff will not become effective until January 1, 2022. Accordingly, the available data sample needed for ORS and other parties to evaluate these Programs is minimal and, as a result, the potential impacts to the consuming and non-consuming public are nebulous.

Prior to the issuance of the schedules in this matter, Duke Energy did not indicate there was any urgency in having these novel Programs approved by the Commission. And, because Duke Energy requested these matters be considered without the need for a hearing and for a Hearing Officer to hold a scheduling conference if hearings were scheduled, ORS proceeded with its evaluation of the Programs expecting that interested parties would be invited to file comments in the dockets. When the Commission established procedural schedules, however, ORS promptly began discussions with a potential expert witness to assist ORS in developing its recommendations and position in the respective dockets, including looking at cost effectiveness, cost estimates,

⁵ ORS issued its first Information Request to the Companies on May 14, 2021. Upon receiving a request to extend the deadline from Duke Energy, the parties agreed to June 3, 2021, as the date for production of the requested materials. ORS issued its second Information Request on July 1, 2021, and received responses from Duke Energy on July 14, 2021. The Commission issued the procedural schedules approximately two (2) weeks later.

avoided cost methodologies and best practices. Thereafter, ORS contacted Duke Energy about engaging the expert pursuant to S.C. Code Ann. § 58-4-100, and ORS and Duke Energy only recently executed the necessary Service Agreements in this regard. To modify the procedural schedule as proposed by the Company, therefore, would restrict the time available to ORS's recently engaged expert and limit the depth of analysis ORS will be able to provide to the Commission when it considers the proposed Programs. ORS respectfully submits that such a result could yield a less than thorough review, which would not serve the public interest or Duke Energy's South Carolina customers.

Further, Duke Energy has not demonstrated there is an urgent need for the proposed Programs to be promptly approved; thus, there is no basis for the Commission to expedite the procedural schedule in this matter. For example, when an electric utility proposes to make changes to its rates or tariffs, the Commission is bound by statute to issue an order approving or disapproving the changes within six (6) months after the date the schedule is filed. S.C. Code Ann. § 58-27-870(B). By contrast, the Commission is not bound by statute or regulation to approve the proposed Programs within a specific time. Because there is no deadline by which the Commission must issue its opinion in this matter and because no information has been provided to justify the rapid implementation of Duke Energy's proposed Programs, limiting ORS's ability to conduct an in-depth review and to file well-developed testimony on the Programs is simply not warranted. To the contrary, if Duke Energy takes the position that additional time is necessary for the Companies to respond to ORS and intervenor testimony, the more appropriate remedy would be to simply delay the hearing(s) rather than prejudice ORS and, by extension, the Duke Energy customers by limiting its time for review.

For these reasons, Duke Energy's request to modify the procedural schedule as proposed in its Motion should be denied.⁶

II. Limiting ORS's ability to file surrebuttal is contrary to the interests of administrative economy and transparency.

Duke Energy has not demonstrated that it is necessary to limit ORS's ability to pre-file surrebuttal testimony only upon a showing that such testimony is warranted and for good cause.

Pre-filed surrebuttal testimony, while generally in the Commission's discretion,⁷ is an integral part of the administrative hearing process; it ensures that ORS and other interested parties can address new matters, facts or evidence raised in the Company's rebuttal testimony. South Carolina courts have recognized surrebuttal as a right where new matters are raised by a party in reply. *See Camlin v. Bi-Lo, Inc.*, 311 S.C. 297, 200, 428 S.E.2d 6, 8 (Ct. App. 1993) ("A defendant has a right to respond to new evidence given in reply") *citing Strait v. City of Rock Hill*, 104 S.C. 116, 88 S.E. 469 (1916). *See also State v. Summer*, 55 S.C. 32, 32 S.E. 771 at 774 (1899) ("[I]f the plaintiff [or the prosecution in a criminal case] in reply puts new matter in evidence, or makes a new case different from that at first made out, it becomes the right of the defendant to call witnesses in surrebuttal.").

Surrebuttal offers a safeguard against the element of unfair surprise when the scope and presentation of an applicant's rebuttal evidence raises issues outside the scope of their direct testimony. Other jurisdictions considering this issue have equated surrebuttal with fairness and transparency, thereby supporting the position that continuing the practice of allowing surrebuttal testimony allows equitable treatment among the parties, and protects the tradition of administrative

⁶ ORS does not oppose minor modifications to the schedule in order to accommodate the consolidation of the two (2) dockets.

⁷ *Palmetto Alliance, Inc. v. S.C. Public Service Comm'n*, 319 S.E.2d 695, 282 S.C. 430 (1984).

fairness in these proceedings. *Ross v. Danter Assocs., Inc.*, 102 Ill. App. 2d 354, 367, 242 N.E.2d 330, 336 (Ill. App. Ct. 1968) (“The purpose of surrebuttal is to permit the defendant to introduce evidence in refutation or opposition to new matters interjected into the trial by the plaintiff on rebuttal. In other words, fairness requires that the defendant be permitted to oppose new matters presented by plaintiff for the first time which the defendant could not have presented or opposed at the time of the presentation of his main case.”) citing *City of Sandwich v. Dolan*, 141 Ill. 430, 31 N.E. 416 and *City of Rock Island v. Starkey*, 189 Ill. 515, 59 N.E. 971.

Pre-filed testimony also serves multiple purposes to enhance and promote efficient proceedings before the Commission and to allow the customers and other interested persons full and transparent insight into the issues to be considered. For example, pre-filed testimony serves as a discovery mechanism such that all parties are made aware of the parties’ positions in advance of the proceeding, without the need to conduct depositions of a party’s witnesses. In addition, it serves as an educational tool for the parties, the Commission, customers, and the public at large on issues that are highly complex and do not lend themselves to being explained in an abbreviated fashion during the course of a hearing on the merits. Limiting ORS’s ability to respond to any issues Duke Energy may raise in rebuttal would necessitate ORS having to rely on cross-examination or prolonged examination of its witnesses on the stand to fully address and articulate its position on these matters, which would result in additional costs incurred, both in terms of time and resources.⁸

⁸ ORS has the right and should be granted a meaningful opportunity to confront its opposing witnesses, and to present evidence it deems sufficient to support its position. If ORS is prevented from doing so, either because the Commission were to break with its longstanding practice of allowing prefiled surrebuttal in this docket or through examination of witnesses on the stand, this would amount to a procedural due process violation. Under these circumstances, ORS would not be afforded the basic opportunity to respond or present evidence through its witnesses on any issues that may be offered by Duke Energy and, therefore, ORS would not be able to be heard in a meaningful or timely way. See S.C. Code Ann. § 1-23-320(E) (“Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.”) (emphasis added); *Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (“The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.”) citing S.C. Const. art. 1, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on

This outcome contravenes the intent of Commission Regulation 103-845.C which states that parties, “insofar as it is practicable, should prefile with all other parties of record copies of prepared testimony and exhibits which the party of record proposes to use during a hearing.” Moreover, it would result in a cumbersome process as ORS would be required to go through the formalities of examining its witnesses on the stand about these matters, which would unduly prolong these proceedings. It also would operate to foreclose customers and the general public from knowing in advance what issues may be addressed in a proceeding.

The Company’s request that ORS be required to obtain leave of the Commission before filing surrebuttal testimony and that a corresponding motion “must affirmatively demonstrate that the testimony is being proffered in response to new matters^[9] injected into the case for the first time in the Company’s rebuttal testimony,” Motion at p. 2, also is unpersuasive. As reflected in the authorities relied upon by both ORS and the Companies, it is clear that the scope of surrebuttal testimony is limited to addressing those new matters or new facts advanced in rebuttal testimony by the party that brought the action. As such, surrebuttal testimony is, by definition, not to be used by a party to advance new positions, evidence, or material that should have been addressed in direct testimony.

Accordingly, it would be superfluous and a disservice to administrative economy to require ORS to seek leave to file surrebuttal testimony to address new matters or facts raised by Duke

due notice and an opportunity to be heard.”). Should this result occur, ORS submits that it would be able to demonstrate sufficient substantial prejudice to prove that procedural due process was violated. *See Ka Fung Chan v. I.N.S.*, 634 F.2d 248 (5th Cir. 1981) (“Proof of denial of due process in an administrative proceeding requires a showing of substantial prejudice”).

⁹ Although Duke Energy’s Motion, if granted, appears to suggest that surrebuttal testimony would be proper only if new “**matters**” are raised by the Company in rebuttal testimony, it is important to note that the case law relied upon by the Companies states that surrebuttal is appropriate for any “new matter or new facts.” *See* Motion at n.1 (emphasis added) *citing State v. Watson*, 353 S.C. 620, 623-24, 579 S.E.2d 148, 150 (Ct.App.). Accordingly, even if the Commission grants Duke Energy’s Motion, it would be wholly appropriate for ORS to file surrebuttal testimony addressing any “new facts” the Companies may submit, not just “new matters.”

Energy when it would not be permitted to do otherwise even under the Commission's prevailing and long-standing practices. Instead, should the Company believe surrebuttal was used in the manner just described, the appropriate remedy would be filing a motion to strike and stating the grounds supporting its position. *See State v. Watson*, 353 S.C. 620, 632, 579 S.E.2d 148, 150 (2003) (recognizing that the factfinder has the discretion to reject surrebuttal if the evidence sought to be introduced should have been introduced at an earlier stage in the proceedings, the evidence is cumulative, or there is no sufficient excuse for not introducing the evidence in chief at the proper time).

At a minimum, ORS should be able to conduct additional examination of its witnesses on the stand to respond to any matters raised by Duke Energy in rebuttal. However, this process would only lengthen the time required for these proceedings, would not further administrative economy and would make for a less transparent proceeding. Even if the Commission allows ORS to conduct additional examination of its witnesses on the stand to respond to any matters raised by Duke Energy in rebuttal, ORS, the Commission, Duke Energy, and Duke Energy customers, would be required to incur additional cost and devote further time and resources, which could otherwise be avoided.

For these reasons, ORS submits that appropriately tailored surrebuttal to the Company's rebuttal should be allowed as a matter of right in the dockets consistent with established Commission practice. Duke Energy's request in this respect would unduly impair administrative economy, be contrary to the interests of transparent proceedings, and would be contrary to the Commission's regulations.

III. Alternatively, the Commission should modify the procedural schedules in a more reasonable manner.

Should the Commission be inclined to modify the procedural schedules in this matter, ORS, in the alternative, would request that the Commission adjust the timeline to reflect the following dates:

DEC/DEP

Companies' Direct	September 7, 2021
ORS/Intervenors' Direct	September 21, 2021
Companies' Rebuttal	October 5, 2021
ORS/Intervenors' Surrebuttal ¹⁰	October 19, 2021
Hearing	October 26, 2021

ORS respectfully submits that revising the procedural schedules along the lines of the above would address Duke Energy's professed need to have additional time to review and evaluate ORS' testimony, such that it would have two (2) weeks thereafter to file its rebuttal testimony. Similarly, ORS would have two (2) weeks to prepare and file its surrebuttal testimony, which would be received by the Commission one (1) week prior to the hearing date in these matters as has been done in numerous other proceedings. *See* Duke Pet. for Recons. at p.9 (requesting that the Commission revise a procedural schedule to provide at least seven (7) days between the filing of surrebuttal and the hearing date). In this manner, all parties would be afforded additional time to review the positions of the other parties, prepare useful and comprehensive testimony, and be in a position to present thorough analyses and recommendations for the Commission's consideration.

¹⁰ As part of this alternative request, ORS does not consent to limiting surrebuttal testimony as proposed by Duke Energy. Rather, ORS asserts that the procedural schedule should permit the other parties of record to file surrebuttal testimony as has been historically permitted by the Commission.

CONCLUSION

WHEREFORE, for the above-stated reasons and for such other reasons and arguments that may be presented at any oral argument related to Duke Energy's motion, ORS respectfully requests that the Commission a) grant Duke Energy's request to consolidate the dockets in the above-captioned proceeding; b) deny Duke Energy's motion to modify the pre-filed testimony schedule in these matters except for such minor adjustments as may be warranted to consolidate the two (2) dockets, c) and deny Duke Energy's request to place unnecessary and improper restrictions on the rights of the parties to respond to Duke Energy's rebuttal testimony. In the alternative, ORS requests the Commission modify the procedural schedules as described in Section III hereinabove. Finally, ORS requests the Commission grant such other relief as is just and proper.



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August 19, 2021
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